

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 24, 2007

**STATE OF TENNESSEE v. MICHELLE LEE MASON**

**Appeal from the Circuit Court for Bedford County**  
**No. 16076     Lee Russell, Judge**

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**No. M2007-00481-CCA-R3-CD - Filed February 15, 2008**

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The defendant, Michelle Lee Mason, was convicted on her guilty plea of aggravated assault, a Class C felony, for which she was sentenced to serve seven years in the Department of Correction as a Range II, multiple offender. The defendant claims on appeal that the trial court erred in denying alternative sentencing. We affirm the trial court's denial of alternative sentencing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

Donna Leigh Hargrove, District Public Defender, and Andrew Jackson Dearing, III, Assistant Public Defender, for the appellant, Michelle Lee Mason.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Charles F. Crawford, District Attorney General; and Michael David Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

According to the record, on May 1, 2006, the defendant stabbed Octavio Valencia in the arm with a knife. When the authorities arrived at the scene, the defendant denied she had engaged in sexual relations with Valencia, but she admitted she had engaged in prostitution with five other customers. The defendant was charged with aggravated assault and aggravated prostitution. She later pled guilty to aggravated assault, and the state dismissed the aggravated prostitution charge. There was no sentencing agreement associated with the defendant's guilty plea.

At the sentencing hearing, the defendant testified that she was thirty-six years old and had dropped out of the ninth grade. She admitted that she had used marijuana, crack cocaine, and amphetamines. Her drug use began as a juvenile. She admitted that she had used crack and alcohol on the day of the offense. She said she was HIV positive and had contracted the virus from a rape.

She said she had participated in religious programs and GED instruction in jail and that she was willing to participate in AA and NA programs. She requested that the court give her a chance to rehabilitate herself and professed that she was finished with illicit drug use.

The defense did not dispute the convictions listed in the presentence report or the Range II, multiple offender status. The presentence report lists three felony convictions for forgery and various other offenses, including assault, drug paraphernalia possession, and prostitution. The defense did not contest that the defendant was on probation for the forgery convictions at the time of the present offense. There was also evidence that the defendant had performed poorly in a Community Corrections program which focused on drug rehabilitation and that she had smoked marijuana the day after her completion of that program.

The defendant faced a sentence of six to ten years for her conviction. See T.C.A. § 40-35-112(b)(3). The trial court found that she had a history of criminal convictions in addition to those used to establish her as a Range II offender and that she committed the offense while on probation. See T.C.A. § 40-35-114(1), (13)(C) (sentence enhancement factors). The court found that no mitigating factors applied. See T.C.A. § 40-35-113. The court imposed a seven-year sentence to be served in the Department of Correction. In denying alternative sentencing, the court noted that the defendant was not presumed a favorable candidate for alternative sentencing by virtue of her Range II classification, that she had a substantial prior record of criminal convictions, and that she had failed to avail herself successfully of the previous opportunity for drug rehabilitation. The court ordered that the defendant serve the sentence consecutively to her previous sentences.

The defendant claims she should have received an alternative sentence. When a defendant appeals the manner of service of a sentence imposed by the trial court, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). However, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sent'g Comm'n Cmts. This means if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168.

When a defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony, the defendant is presumed to be a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). However, this presumption may be rebutted upon a showing that (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)-(C)). The trial court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5); Boston, 938 S.W.2d at 438.

In the present case, the defendant was a Range II offender who did not enjoy the presumption of favorable candidacy for alternative sentencing. See T.C.A. § 40-35-102(6). In addition, she had a lengthy history of criminal convictions and had demonstrated failure at past rehabilitative efforts. These facts, as found by the trial court, are supported by the record. On appeal, the defendant has not overcome the presumptive correctness of the trial court's determination.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE